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Switzerland's Perspective on Directors's and Managers's Remunerations: Legislative Model or Economic Dead End?

by

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Overview

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Preliminary Remarks

a) Reasons for Invitation to Paris...

- ... the Swiss are *very nice* People...
Swiss Cheese Fondue, the famous Roger Federer and the even more famous „Heidi“ etc.
- ... the Swiss are – sometimes – *strange* People...
e.g. „What about the „Banking Secrecy Laws“ in Switzerland“?!?
- ... and, finally, the Swiss might have „*Things to Tell*“...
i.e. the so-called „Abzocker-Initiative“ („Rip-Off Initiative“ or „Greedy Bastards Initiative“ ☺)

Preliminary Remarks

b) Swiss Experiences – Examples

- *Percy Barnevik („ABB“)*
2002: „Golden Good-bye“ approx. CHF 150 Mio. (for Pension Fund)

- *Brady Dougan („Credit Suisse“)*
2010: CEO Compensation approx. CHF 70 Mio.

- *Daniel Vasella („Novartis“)*
2007: approx. CHF 30 Mio.; 2013: Non-competition Agreement approx. CHF 70 Mio. (rescinded)

Popular Initiative (and its Execution)

a) Popular Initiative

- Switzerland's Constitution („Bundesverfassung“)
new *Article 95 Alinea 3 SC* (see **enclosure 1** – and the following pages)
- 2006 – 2008:
114'260 Swiss citizens signed Popular Initiative of *Thomas Minder* (Small Businessman/Politician)
- 2013:
Popular Initiative was adopted by a *68% Yes-Vote* (and by *all 26 Swiss Cantons*)

Art. 95 Al. 3 SC – French Version (1/2)

³ En vue de protéger l'économie, la propriété privée et les actionnaires et d'assurer une gestion d'entreprise durable, la loi oblige les sociétés anonymes suisses cotées en bourse en Suisse ou à l'étranger à respecter les principes suivants:

- a. l'assemblée générale vote chaque année la somme globale des rémunérations (argent et valeur des prestations en nature) du conseil d'administration, de la direction et du comité consultatif. Elle désigne chaque année le président du conseil d'administration et, un par un, les membres du conseil d'administration et les membres du comité de rémunération ainsi que le représentant indépendant. Les caisses de pension votent dans l'intérêt de leurs assurés et communiquent ce qu'elles ont voté. Les actionnaires peuvent voter à distance par voie électronique; ils ne peuvent pas être représentés par un membre d'un organe de la société ou par un dépositaire;

Art. 95 Al. 3 SC – French Version (2/2)

- b. les membres des organes ne reçoivent ni indemnité de départ ni autre indemnité, aucune rémunération anticipée ni prime pour des achats ou des ventes d'entreprises, et ne peuvent pas être liés par un autre contrat de conseil ou de travail à une société du groupe. La gestion de la société ne peut pas être déléguée à une personne morale;
- c. les statuts règlent le montant des rentes, des crédits et des prêts octroyés aux membres des organes, les plans de bonus et de participation et le nombre de mandats externes de ces derniers, de même que la durée du contrat de travail des membres de la direction;
- d. toute violation des dispositions prévues aux let. a à c sera sanctionnée d'une peine privative de liberté de trois ans au plus et d'une peine pécuniaire pouvant atteindre six rémunérations annuelles.

Art. 95 Al. 3 SC – German Version (1/2)

³ Zum Schutz der Volkswirtschaft, des Privateigentums und der Aktionärinnen und Aktionäre sowie im Sinne einer nachhaltigen Unternehmensführung regelt das Gesetz die im In- oder Ausland kotierten Schweizer Aktiengesellschaften nach folgenden Grundsätzen:

- a. Die Generalversammlung stimmt jährlich über die Gesamtsumme aller Vergütungen (Geld und Wert der Sachleistungen) des Verwaltungsrates, der Geschäftsleitung und des Beirates ab. Sie wählt jährlich die Verwaltungsratspräsidentin oder den Verwaltungsratspräsidenten und einzeln die Mitglieder des Verwaltungsrates und des Vergütungsausschusses sowie die unabhängige Stimmrechtsvertreterin oder den unabhängigen Stimmrechtsvertreter. Die Pensionskassen stimmen im Interesse ihrer Versicherten ab und legen offen, wie sie gestimmt haben. Die Aktionärinnen und Aktionäre können elektronisch fernabstimmen; die Organ- und Depotstimmrechtsvertretung ist untersagt.

Art. 95 Al. 3 SC – German Version (2/2)

- b. Die Organmitglieder erhalten keine Abgangs- oder andere Entschädigung, keine Vergütung im Voraus, keine Prämie für Firmenkäufe und -verkäufe und keinen zusätzlichen Berater- oder Arbeitsvertrag von einer anderen Gesellschaft der Gruppe. Die Führung der Gesellschaft kann nicht an eine juristische Person delegiert werden.
 - c. Die Statuten regeln die Höhe der Kredite, Darlehen und Renten an die Organmitglieder, deren Erfolgs- und Beteiligungspläne und deren Anzahl Mandate ausserhalb des Konzerns sowie die Dauer der Arbeitsverträge der Geschäftsleitungsmitglieder.
 - d. Widerhandlung gegen die Bestimmungen nach den Buchstaben a-c wird mit Freiheitsstrafe bis zu drei Jahren und Geldstrafe bis zu sechs Jahresvergütungen bestraft.
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Art. 95 Al. 3 SC – English Version (1/2)

English is not an official language of the Swiss Confederation. This translation is provided for information purposes only and has no legal force.

³ For the protection of the economy, private property and shareholders and to guarantee sustainable corporate governance, the law shall regulate Swiss companies limited by shares listed on stock exchanges in Switzerland and abroad in accordance with the following principles:

- a. the general meeting votes on an annual basis on the total amount of all remuneration (money and the value of benefits in kind) given to the board of directors, the executive board and the board of advisors. It elects on an annual basis the president of the board of directors, the individual members of the board of directors and the remuneration committee, and the independent proxy. Pension funds vote in the interests of their insured members and disclose how they have voted. Shareholders may vote remotely online; they bank;

Art. 95 Al. 3 SC – English Version (2/2)

- b. the members of management may not be given severance or similar payments, advance payments, bonuses for company purchases and sales, additional contracts as consultants to or employees of other companies in the group. The management of the company may not be delegated to a legal entity;
- c. the articles of association regulate the amount of credits, loans and pensions payable to members of management, their profit-sharing and equity participation plans and the number of mandates they may accept outside the group, as well as the duration of employment contracts of members of the executive board;
- d. Persons violating the provisions under letters a-c are liable to a custodial sentence not exceeding three years or to a monetary penalty not exceeding six times their annual remuneration.

Popular Initiative (and its Execution)

b) Step 1: Draft Ordinance by DoJ („Abzocker-Verordnung“)

- Legal Basis for Federal Council („Bundesrat“):
new Article 197 Chapter 8 SC = *within one year*, i.e. until March 3, 2014 (at the very latest)
- Legally, what needs to be Done?
e.g. (i) PVK in NZZ (see enclosure 2) + (ii) *Federal Council's Draft* (see enclosure 3)

Popular Initiative (and its Execution)

c) Step 2: Swiss Corporation Law Revision („Aktienrechtsrevision“)

- 2005:
Legislative Project regarding Corporate Governance
- 2008 – 2012:
Swiss Parliament's Preoccupation with the „Abzocker-Initiative“
- 20xx:
Legislative Incorporation of the „Abzocker-Initiative“ – but *no time-limits...*

Contents – Examples

a) Say on Pay

- AGM Voting on Remunerations
i.e. *Total Remuneration* (both monetary and in kind) not „System“ or „Report“ etc.
- Shareholders' Voting on Compensations for...
(i) Board of Directors + (ii) *Management* (CEO etc.) + (iii) Advisory Board
- Legal Consequences?
AGM Voting on Remuneration shall be *legally binding* for Swiss Public Companies

Contents – Examples

b) Legal Bans on (certain) Remunerations

- No Compensations *on Departure* („Golden Good-byes“)
Legal Issue: Non-competition Agreement which is permitted under Swiss laws
- No Compensations *in Advance* („Golden Hellos“)
Legal Issue: Compensation for waived Remuneration with former Employer(s)
- No Premiums *for Acquisitions or Sales* of Companies

Contents – Examples

c) Criminal Sanctions – and the Rule of Law...

- No „White Collar Crimes“ in Switzerland:
Imprisonment for up to Three Years + Fines of up to Six Years‘ Remuneration
- Legal Uncertainties remain as of Today...
(i) Who is *Offender*? (ii) What *Behaviour* is Criminal?
- Principle of „*Nulla Poena sine Lege*“ without Merit?
Surprisingly, the Federal Council (and its DoJ) proposes criminal sanctions *without law*...

Contents – Examples

d) Miscellaneous

- *Pension Funds* („Pensionskassen“):
Obligation to Vote at AGM + Mandatory Disclosure regarding their Voting

- *Proxy Voting*:
Prohibited for a Member of the Company („Organvertretung“) or by a Depositary („Bank“)

- *Swiss Group Law* („Konzernrecht“):
e.g. Limitation on Work for another Group Company; External Mandates in Articles

Final Remarks

1. *Vox Populi*

The negative and often aggressive emotions against „Rip-Off Artists“ (i.e. „Vasella & Co.“) went high in Switzerland but *results are indisputable* and must be accepted; however, the *DoJ draft ordinance* is – in some areas (in particular, regarding criminal sanctions) – in my view *more political than legal*...

2. *Execution*

The popular initiative was – from a legal perspective – *not a good work* but, nevertheless, it „worked“ – all depends on the execution by both the Federal Council and the Swiss Parliament.

3. *Model or Dead End?*

Until recently, the *Swiss corporation law* was a legislative model for its *flexibility* – this will now considerably change regarding the remunerations‘ aspect but not necessarily for all corporate law aspects; personally, I doubt that the „Swiss way“ will really be a model for other countries.

4. *The Jury is still out...*

Of course, observers (and politicians) abroad are *very interested* – among others, our own *Séminaire franco-allemand*; yet, it remains to be seen whether or not other countries actually adopt the new tough „Swiss regulations“ in this regard! Switzerland is now a *laboratory* to be watched over the next few years...

Thanks For your Attention..!

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